No. 04-1432

IN THE

Supreme Court of the United States

S. JAMES BROWN, JOINT TENANT TRUSTEE,
Petitioner,

v.

MONTGOMERY COUNTY, MONTGOMERY COUNTY BOARD OF ASSESSMENT, MONTGOMERY COUNTY TAX CLAIM BUREAU, M. ELIZABETH MCBRIDE, DEPUTY TREASURER FOR THE TAX CLAIM BUREAU, AND AS AN INDIVIDUAL, BOROUGH OF TRAPPE, EDWARD W. GILLESPIE, TAX COLLECTOR FOR THE BOROUGH OF TRAPPE, AND AS AN INDIVIDUAL, AND PERKIOMEN VALLEY SCHOOL DISTRICT,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF OF RESPONDENT, PERKIOMEN VALLEY SCHOOL DISTRICT, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF THE CASE

Petitioner, S. James Brown ("Brown"), has filed a Petition for a Writ of Certiorari with the Supreme Court of the United States, after failing to gain approval from the courts of Pennsylvania for attempting to avoid lawful real estate taxation by placing his real property into a "trust."

According to Brown's civil action Complaint and the record developed in the Court of Common Pleas of Montgomery County, Pennsylvania, the relevant facts and procedural history of this case are as follows.[1] From September 7, 1983, to September 24, 1997, Brown was the owner of certain real property located at 371 West Main Street in Trappe, Montgomery County, Pennsylvania, or parcel number 23-00-00781-00-6 (hereinafter, "the Subject Property"). (Record 18a-21a.) The Subject Property is located within the taxing districts of the various Respondents in this case, including Perkiomen Valley School District.

On February 24, 1997, Brown executed a "Declaration of Trust" and other documents that he claims created the "Kepoint Preservation Trust." (Record 18a-20a.) On that date, Brown conveyed the Subject Property to R. Craig Brown, his brother, as a "straw party mediator." *Id.* Brown's brother, in turn, reconveyed the Subject Property to Kepoint Preservation Trust and simultaneously appointed W. Regan Brown and Marge Brown, Brown's brother and mother, respectively, as "Joint Tenant" Trustees of the Kepoint Preservation Trust, to hold legal title to the Subject Property. (Record 20a.) On February 26, 1997,

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[1] It is the understanding of the undersigned counsel that the Record from the Pennsylvania proceedings has not yet been transmitted to this Court. All citations to the Record are therefore taken from the Reproduced Record filed by Brown in the Commonwealth Court of Pennsylvania.

two days after Brown's original conveyance of the Subject Property, Brown was "unanimously" nominated by W. Regan Brown and Marge Brown to serve as a "Trustee for life" of the Kepoint Preservation Trust. (Record 24a.) Thus, Brown presently claims to be one of three "joint tenant trustees" of Kepoint Preservation Trust. (Record 25a-32a.)

The claimed "beneficiaries" of the trust are Elizabeth Brown and Samuel J. Brown, Sr., Brown's great aunt and father, respectively. (Record 17c-18c.) However, the trust has been arranged so that the trustees may change or add beneficiaries as they should desire. (Record 26c.) Notwithstanding the above, Brown still resides on the first floor of the residence located on the Subject Property, as is confirmed by the Petitioner's address listed on the record of this case. (Record 39c-40c.) (*See also* Brown's Petition for a Writ of Certiorari.) A third party resides on the second floor of the residence and pays rent to Brown pursuant to a lease agreement. (Record 40c.)

In each year from 1997 through 2003, the Respondents, including Perkiomen Valley School District, taxed Kepoint Preservation Trust, the present registered title owner of the Subject Property, for the property pursuant to the Pennsylvania General County Assessment Law. *See* 72 P.S. §5020.101, *et seq.* ("GCAL"). Inasmuch as the taxes were not paid, the Montgomery County Tax Claim Bureau placed liens on the Subject Property, and scheduled numerous tax sales that were subsequently continued. The property taxes have since been paid, under protest.

Brown then initiated this action on or about March 14, 2003, by filing a three-count Complaint in the Court of Common Pleas of Montgomery County, Pennsylvania, at docket number 2003-04688. (*See* Appendix to Brown's Petition for a Writ of Certiorari, at 23a-40a.) Brown's Complaint asserted claims for

declaratory judgment and injunctive relief, as well as a claim pursuant to 42 U.S.C. § 1983 as a result of the Respondents' taxation of the Subject Property pursuant to the GCAL. *Id.* Brown's Complaint sought, *inter alia*, monetary damages; declaratory relief; an injunction preventing the Respondents from enforcing any levy, assessment or collection; and the issuance of an order vacating any tax lien, assessment and/or collection effort against the Subject Property. *Id.*

At the trial court level, the crux of Brown's argument was that the Respondents improperly taxed the Kepoint Preservation Trust because the trust was a "document" that is excluded from taxation under a different Pennsylvania taxing statute, the Real Estate Transfer Tax Act, 72 P.S. §8101-C, *et seq.* (*See* Appendix to Brown's Petition for a Writ of Certiorari, at 32a, ¶ 25.) However, the Pennsylvania Real Estate Transfer Tax Act and its exclusions have no application to this case, inasmuch as the relevant taxes were not levied upon the transfer or conveyance of the Subject Property, but rather, were levied upon the property itself pursuant to the GCAL.

The Respondents, including Perkiomen Valley School District, filed timely Preliminary Objections to Brown's Complaint, as well as an Answer to his Petition for Preliminary Injunctive Relief. The Respondents asserted, *inter alia*, that Brown's action should be dismissed because he failed to exhaust all available statutory and administrative remedies for challenging the taxation of the subject property. *See* 72 P.S. §5020-511. Specifically, Section 5020-511 of the CGAL requires a taxpayer challenging taxation under the General County Assessment Law to "apply for redress" by proceeding to a hearing before a three-member board of assessment appeals.

On May 6, 2003, the trial court, per the Honorable Thomas C. Branca, held a full hearing on the

merits of Brown's Petition for Preliminary Injunctive Relief. (Record 1c-74c.) By Decree dated May 12, 2003, the trial court denied Brown's Petition, and pursuant to the Respondents' Preliminary Objections, also dismissed Brown's Complaint. (*See* Appendix to Brown's Petition for a Writ of Certiorari, at 15a.) Among other things, the trial court concluded that it lacked jurisdiction over the subject-matter of the Complaint and the Petition for Injunctive Relief, due to Brown's failure to exhaust the administrative remedies set forth under the GCAL. *Id.* In its subsequent opinion of July 25, 2003, the trial court further noted that in the pleadings and at the hearing, "Brown did not dispute the defendants' assertion that he must obtain an exemption pursuant to the exclusive statutory remedies provided in 72 P.S. §5020-201 *et seq.*" (*See* Appendix to Brown's Petition for a Writ of Certiorari, at 9a.) The trial court also noted Brown's admission that he had filed no claim for tax exemption, and that there was no record of such an exemption for the Subject Property on the tax rolls. *Id.*

Brown then appealed the decision of the trial court to the Commonwealth Court of Pennsylvania, which affirmed the trial court's Decree in a Memorandum Opinion and Order dated March 15, 2004. (*See* Appendix to Brown's Petition for a Writ of Certiorari, at 2a-4a.) Brown's subsequent Application for Reargument was denied by the Commonwealth Court of Pennsylvania on May 12, 2004. (*See* Appendix to Brown's Petition for a Writ of Certiorari, at 5a.)

Thereafter, Brown filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania, seeking a reversal of the decision entered by the Commonwealth Court. On January 25, 2005, the Supreme Court of Pennsylvania denied Brown's Petition, as well as the Application for an injunction that he had also filed with the court. (*See* Appendix to Brown's Petition for a Writ of Certiorari, at 1a.)

Brown has now filed a Petition for a Writ of Certiorari with the Supreme Court of the United States, seeking a reversal of the decisions entered by the courts of Pennsylvania, holding that a taxpayer may not avoid lawful real estate taxation simply by placing taxable real property into a "trust."

SUMMARY OF THE ARGUMENT

The Petition for a Writ of Certiorari filed by Petitioner, S. James Brown, Joint Tenant Trustee, should be denied. As an initial matter, in order for a Writ of Certiorari to be issued, Brown must demonstrate that the Supreme Court of Pennsylvania has "decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;" has "decided an important question of federal law that has not been, but should be, settled by this Court;" or has "decided an important federal question in a way that conflicts with relevant decisions of this Court." U.S. Sup. Ct. R. 10. None of these events have occurred.

First, the law permits corporations and other artificial entities such as trusts to appear in federal courts only through licensed counsel. *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 195, 113 S.Ct. 716, 121 L.Ed.2d 656 (1993). Here, Brown brings his Petition for a Writ of Certiorari on behalf of the Kepoint Preservation Trust as its "Joint Tenant Trustee." However, Brown is not a licensed attorney, and therefore, he may not act *pro se* or as counsel for any party other than himself. Because Brown is participating in the unauthorized practice of law, his Petition should be denied.

Second, the Pennsylvania General County Assessment Law, 72 P.S. §5020.101, *et seq.* ("GCAL"),

does not impair or violate any of the rights of Brown or the Kepoint Preservation Trust under the Constitution of the United States. Brown asserts that the act of taxing the Subject Property violates the Contract Clause of the United States Constitution because it "impairs the obligation of contract embodied in a trust deed." However, Brown has failed to demonstrate, at any point in these proceedings, that the Kepoint Preservation Trust is a "contract" within the meaning of Article I, Section 10 of the Constitution. To the contrary, the taxes that were levied upon the Subject Property were not imposed upon the transfer or conveyance of the property pursuant to a "contract," but rather, were imposed on the real estate itself pursuant to the GCAL. Furthermore, Brown has failed to demonstrate how or why any contractual obligations have been impaired through taxation by the Respondents. In the absence of such proof, this Court has consistently held that real property is the appropriate subject of taxation by the states, whether the property is held by a natural person, a corporation, a trust or another entity. Therefore, Brown's assertion that the GCAL is unconstitutional is without merit, and his Petition should be denied.

Finally, Brown's action was appropriately dismissed as a result of his failure to exhaust the administrative remedies established by Pennsylvania for challenging taxation under the CGAL. Specifically, any challenges to taxation under the GCAL are required to be submitted first to the appropriate administrative body, namely, a three-member Board of Assessment Appeals, before resorting to the courts of Pennsylvania. *See* 72 P.S. §5020.511. Such state administrative remedies for challenges to taxation have been explicitly approved by this Honorable Court and cannot be circumvented by a taxpayer simply by re-characterizing the claim as a Constitutional challenge under Section 1983. *See National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 515 U.S. 582, 115 S.Ct.

2351, 132 L.Ed.2d 509 (1995). Inasmuch as Brown failed to exhaust the administrative remedies available to him under Pennsylvania law, his action was appropriately dismissed. Accordingly, his Petition for a Writ of Certiorari should be denied.

ARGUMENT

I. Standard.

Review on a writ of certiorari is not a matter of right, but of this Court's discretion. U.S. Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." *Id.* "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.*

Here, Brown requests the issuance of a Writ of Certiorari following the denial of his Petition for Allowance of Appeal by the Supreme Court of Pennsylvania, which is the court of last resort in Pennsylvania. Therefore, pursuant to United States Supreme Court Rule 10, Brown must demonstrate that the Supreme Court of Pennsylvania has either "decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;" that it has "decided an important question of federal law that has not been, but should be, settled by this Court;" or that it has "decided an important federal question in a way that conflicts with relevant decisions of this Court." *Id.* It is respectfully submitted that the Petitioner cannot demonstrate that any of the aforementioned conditions have been met. Accordingly, Brown's Petition for a Writ of Certiorari should be denied.

II. Brown's Petition For A Writ of Certiorari Should Be Denied Because He Cannot Represent Kepoint Preservation Trust *Pro Se* In This Action.

Although it did not form the basis of any of the Pennsylvania courts' decisions to dismiss or uphold the dismissal of this action, Perkiomen Valley School District renews its argument that Brown is not able to represent Kepoint Preservation Trust in this case because he is not a licensed attorney. Brown claims to pursue this action and his Petition for a Writ of Certiorari as the "Joint Tenant Trustee" of Kepoint Preservation Trust, and asserts that he is entitled to sue "as a real party in interest on behalf of the trust beneficiaries." (*See* Appendix to Brown's Petition for a Writ of Certiorari, at 6, citing *Navarro Savings Ass'n. v. Lee*, 446 U.S. 458, 465 n. 14, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980).)[2] Although it may be true, as Brown suggests, that trustees generally possess legal title in the assets of trust property, that they manage the assets of the trust, and that they are the real parties in interest to a controversy regarding the assets of the trust, Brown cites no authority in support of his contention that a trustee may represent the interests of the trust *pro se* by appearing in court without the assistance of an attorney. Indeed, even in *Navarro*, the only case cited by Brown on this issue, the trustee was represented by counsel. *Id.* at 459.

28 U.S.C. §1654 provides that "[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel." This Court has observed, however, that the law permits corporations and other artificial entities to appear in

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[2] Notably, Brown does not state whether the other "Joint Tenant Trustees" of the Kepoint Preservation Trust consent to or approve of his pursuit of this action.

federal courts only through licensed counsel. *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 202, 113 S.Ct. 716, 121 L.Ed.2d 656 (1993), citing *Osborn v. President of Bank of United States*, 9 Wheat. 738, 829, 6 L.Ed. 204 (1824), *Eagle Associates v. Bank of Montreal*, 926 F.2d 1305, 1308 (2d Cir. 1991) (Section 1654 "does not allow for unlicensed laymen to represent anyone else other than themselves."). Although the undersigned counsel has been unable to find any Supreme Court cases in which the above rule was specifically applied to matters involving a trustee, at least two United States Courts of Appeals have held that trustees must obtain counsel to pursue claims involving the trust. *See Knoefler v. United Bank of Bismarck*, 20 F.3d 347, 348 (8th Cir. 1994); *C.E. Pope Equity Trust v. United States*, 818 F.2d 696, 697-98 (9th Cir. 1987). *See also Appeal of Manderson*, 113 Pa. 631, 634, 6 A. 893, 894 (1886) (Under Pennsylvania law, a trustee has a duty "to employ counsel, and, as incident thereto, to appropriate so much of the trust-estate as [is] necessary to reasonably compensate him for his services.").

It should be noted that prior to bringing the within action in the Court of Common Pleas of Montgomery County, Brown initiated a separate action in the United States District Court for the Eastern District of Pennsylvania on behalf of Kepoint Preservation Trust, seeking to avoid the imposition of realty transfer taxes. (*See Kepoint Preservation Trust Org., by and through J. Brown, Joint Tenant Trustee v. D. Michael Fisher, et al.*, United States Court of Appeals for the Third Circuit, No. 01-3708 (June 26, 2002), attached hereto in Appendix at 1a.) The District Court dismissed Brown's Complaint pursuant to the Tax Injunction Act, 28 U.S.C. §1341, and Brown filed an appeal to the Third Circuit Court of Appeals. The Third Circuit affirmed the dismissal of Brown's appeal, holding in part that Brown was not permitted to

represent the interests of the Kepoint Preservation Trust *pro se*. *Id.* at 3-4.

For the reasons expressed above, Brown is not a licensed attorney and is not permitted to represent a party other than himself, including the Kepoint Preservation Trust. Accordingly, Brown's Petition for a Writ of Certiorari must be dismissed.

III. Brown's Petition For A Writ Of Certiorari Should Be Denied Because He Has Failed To Demonstrate That The Pennsylvania General County Assessment Law, 72 P.S. §5020-101, *et seq.*, Violates Any Rights Under The Constitution.

A. The Respondents' taxation of the Subject Property pursuant to the Pennsylvania General County Assessment Law was proper.

The Kepoint Preservation Trust was taxed as the record owner of the Subject Property, pursuant to the Pennsylvania General County Assessment Law, 72 P.S. §§5020-101, *et seq*. Section 201 of the GCAL provides, in relevant part, as follows:

> "***The following subjects and property shall***, as hereinafter provided, ***be valued and assessed, and subject to taxation*** for all county, city, borough, town, township, school and poor purposes at the annual rate:
>
> (a) ***All real estate, to wit: Houses***, house trailers and mobilehomes buildings permanently attached to land or connected with water, gas, electric or sewage facilities, ***buildings, lands,***

lots of ground... and all other real estate not exempt by law from taxation...."

72 P.S. §5020-201(a) (emphasis added). The Subject Property, which consists of a residential building and land, is clearly taxable real property under the above provisions of the GCAL. Furthermore, Pennsylvania law clearly holds that the payment of real estate taxes is the obligation of the land owner. *City of Erie v. R.D. McAllister & Son*, 416 Pa. 54, 204 A.2d 650, 659 (1964). Inasmuch as the Kepoint Preservation Trust is the record owner of the Subject Property, the Respondents appropriately assessed real property taxes upon the Kepoint Preservation Trust.[3]

B. Respondents' taxation of the Subject Property does not offend the Contracts Clause of Article I, Section 10 of the United States Constitution.

The focus of Brown's argument concerning the impropriety of taxation under the GCAL has changed at every level of this case. Brown initially argued that the property was exempt from taxation under the GCAL because the Kepoint Preservation Trust allegedly falls within the description of an "excluded transaction" under the Real Estate Transfer Tax Act. (*See* Appendix to Brown's Petition for a Writ of Certiorari, at 32a, ¶ 25, citing 72 P.S. §8102-C.3(2) ("The tax imposed by section 1102-C shall not be imposed upon... [a] document which the Commonwealth is prohibited from taxing under the Constitution or statutes of the United States.").) However, Brown's argument failed because the taxes

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[3] The GCAL provides thirteen different exemptions to taxation. 72 P.S. §5020-204(a). However, Brown has never contended and/or shown that the Subject Property falls under one of those exemptions to taxation under the GCAL.

levied upon the Subject Property were not imposed upon the transfer or conveyance of the property pursuant to the Pennsylvania Real Estate Transfer Tax Act, but rather, were imposed on the real estate itself pursuant to the Pennsylvania General County Assessment Law, 72 P.S. §5020.101, et seq. ("GCAL"). Furthermore, inasmuch as Brown was unable to cite any authority in support of his contention that the exclusions provided under the Real Estate Transfer Tax Act apply equally to taxes levied under the GCAL, or any other taxing statute, the Pennsylvania courts appropriately rejected Brown's argument.

Although he found no support for the application of the Real Estate Transfer Tax Act exclusions to this case, Brown continued to cite the language from that statute, asserting that the Kepoint Preservation Trust is a "document which the Commonwealth is prohibited from taxing under the Constitution and statutes of the United States." Brown's argument has since been recast into his present claim that the GCAL "impairs the obligation of contract embodied in a trust deed... in violation of the Contract Clause of Article I, § 10, or the Due Process or Equal Protection Clauses of the Fourteenth Amendment." (*See* Brown's Petition for a Writ of Certiorari, at 22, citing U.S. Const. art. I, § 10 ("No state shall... pass any... Law impairing the Obligation of Contracts.").) This argument is also without merit.

1. The states have broad powers to collect taxes on property falling within their jurisdiction.

Brown has failed to demonstrate, at any point in these proceedings, how or why the taxation of the Subject Property pursuant to the GCAL is

unconstitutional or invalid. It is well-settled that the states have broad powers to establish their own system of imposing and collecting taxes. *Allegheny Pittsburgh Coal Co. v. County Comm'n. of Webster County, W. Va.*, 488 U.S. 336, 344, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989). "Power to tax for the support of the State governments exists in the States independently of the national government." *Transportation Co. v. Wheeling*, 99 U.S. 273, 279, 25 L.Ed. 412 (1878).

The right to tax is also established under Article VIII of the Pennsylvania Constitution. *Commonwealth of Pennsylvania v. Perkins*, 342 Pa. 529, 531, 21 A.2d 45, 47 (1941) ("The taxing power is vested absolutely in the legislature as an attribute of sovereignty with no other [limitation] upon its exercise than the Constitutions, State and Federal, and the laws of the United States, and the power to tax is bounded only by the necessity of the State and the will of the people."). Notably, although the Pennsylvania Constitution enumerates certain types of property that may be exempt from taxation, it does not provide an exemption for property held in trust. *See* Pa. Const. art. VIII, § 2. *See also* Pa. Const. art. VIII, § 5. Exercising its right to establish a system of taxation, the Pennsylvania legislature enacted the GCAL to permit local governmental entities, such as the Respondents, to assess and collect taxes on real property falling within their boundaries.

This Honorable Court has held that except as restrained by the Constitution of the United States or their own constitutions, each state, "has full power to prescribe any system of taxation which, in its judgment, is best or necessary for its people and government." *Southwestern Oil Co. v. State of Texas*, 217 U.S. 114, 127, 30 S.Ct. 496, 54 L.Ed. 688 (1910). This Court has also held:

> "The Federal Constitution imposes on the states no particular modes of taxation, and apart from

> the specific grant to the federal government of the exclusive power to levy certain limited classes of taxes and to regulate interstate and foreign commerce, it leaves the states unrestricted in their power to tax those domiciled within them, so long as the tax imposed is upon property within the state or on privileges enjoyed there, and is not so palpably arbitrary or unreasonable as to infringe the Fourteenth Amendment."

Lawrence v. State Tax Comm'n. of State of Mississippi, 286 U.S. 276, 279-280, 52 S.Ct. 556, 76 L.Ed. 1102 (1932). In the absence of inequalities or arbitrary action, it is not the purpose of the Fourteenth Amendment "to interfere with the discretionary power of the states to raise necessary revenues by imposing taxes and assessments upon property within their jurisdictions." *Philip Wagner v. Oscar Leser, A. B.*, 239 U.S. 207, 216, 36 S.Ct. 66, 60 L.Ed. 230 (1915).

2. The Kepoint Preservation Trust is not a "contract" under the meaning of the Contracts Clause.

Brown does not allege that the taxation of the Subject Property was in any way arbitrary or discriminatory. Rather, Brown asserts that he may avoid lawful taxation by placing his property into a trust that he alone characterizes as a "contract," the obligations of which would be allegedly impaired if taxed. *See* U.S. Const. art. I, § 10 ("No state shall... pass any... Law impairing the Obligation of Contracts.").

As an initial matter, the Kepoint Preservation Trust does not fall within the definition of a "contract"

for purposes of protection under Article I, Section 10 of the Constitution. It is well-settled that the word "contracts," as used in the Contracts Clause, "is used in its usual or popular sense as signifying an agreement of two or more minds, upon sufficient consideration, to do or not to do certain acts. 'Mutual assent [express or implied] to its terms is of its very essence.'" *Crane v. Hahlo*, 258 U.S. 142, 146, 42 S.Ct. 214, 66 L.Ed. 514 (1922); *Morley v. Lake Shore & M.S.R. Co.*, 146 U.S. 162, 170, 13 S.Ct. 54, 36 L.Ed. 925 (1892). Here, Brown has failed to demonstrate that the Kepoint Preservation Trust possesses the necessary incidents of a "contract" under the ordinary definition. To the contrary, there was no agreement of two or more individuals to do or not do certain acts, nor was there any exchange of consideration.

In support of his argument that the Kepoint Preservation Trust is a "contract" that may not be impaired through taxation, Brown principally relies upon this Court's statement in *Coolidge v. Long*, 282 U.S. 582, 51 S.Ct. 306, 75 L.Ed. 562 (1930), that "[t]he trust deeds are contracts within the meaning of the contract clause of the Federal Constitution." 282 U.S. at 595. However, a closer examination of *Coolidge* reveals that the present case is factually distinguishable, and that Brown has taken one isolated statement from *Coolidge* out of context.

First, the main issue presented in *Coolidge* was whether the trust deeds in that case could be subjected to taxation where they "were fully executed *before* the taking effect of the state law under which the excise is claimed." 282 U.S. at 595 (emphasis added). In that regard, the Court's holding, that states cannot impair through taxation rights that are already vested pursuant to a contract, is plainly distinguishable. Here, the GCAL was enacted by the Pennsylvania legislature in 1933, fifty years before Brown acquired the Subject

Property and more than sixty years before he conveyed the property into the Kepoint Preservation Trust through various "straw party mediators." (Record 18a-21a.) Therefore, unlike in *Coolidge*, it is clear that the Respondents did nothing to impair or destroy the rights that were already allegedly vested under the Kepoint Preservation Trust documents.

Second, it is clear that the facts in *Coolidge* are distinct from those in the present case regarding the existence of a "contract" for purposes of the Contracts Clause. *Coolidge* involved the formation of a mutually irrevocable trust by *two individuals*, who agreed to divest themselves of the right of possession or enjoyment of their property, in consideration for the other spouse's mutual promise. Here, by contrast, Brown has not demonstrated that *one person's* act of placing real property into a trust constitutes the formation of such a contract. Furthermore, it is clear from the facts of this case that Brown continues to possess and enjoy the Subject Property, as he is the "Trustee for Life" of the Kepoint Preservation Trust and presently resides and collects rent on the property.

Brown's reliance upon *Coolidge* also demonstrates that the Petitioner continues to misapprehend the nature of the tax imposed by the Respondents. In *Coolidge*, the relevant statute imposed taxes on the "deed, grant or gift" of property. 282 U.S. at 595. Here, by contrast, the relevant taxes were not imposed upon the transfer of the Subject Property or upon the formation of a contract. Nor was the tax levied upon Brown's act of placing the property into the "trust" or upon Brown's performance of his duties as a trustee of the Kepoint Preservation Trust. Although Brown appears to believe otherwise, the Respondents were simply taxing real property, and were not taxing a contract or other document. Consequently, the various Constitutional standards and Supreme Court

authorities cited by Brown in support of his nonspecific argument that individuals generally possess the "freedom to contract" and have the "right to private property," yield to more fully developed and applicable legal principles.

3. Respondents did not impair any "obligation of contract" as defined under the Contracts Clause.

Brown's remaining analysis of the Contracts Clause, and his reasoning that the Respondents have impaired the "obligation of contract," are also fatally flawed. "The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced- - by which the parties can be obliged to perform it." *Hendrickson v. Apperson*, 245 U.S. 105, 113, 38 S.Ct. 44, 62 L.Ed. 178 (1917). Legislation therefore impairs the obligation of contract if it lessens the efficacy of the means to enforce the obligation or if it tends to postpone or retard the enforcement of the contract. *Id.* Here, Brown has not pointed to any impaired obligation under the alleged "contract," nor can he show that the GCAL lessens the capacity or power of the contracting parties to enforce the terms of that contract.

Although Brown routinely cites isolated statements from centuries-old cases addressing alleged violations of the Contracts Clause, this Honorable Court provided a more modern analysis of the Contracts Clause in *Keystone Bituminous Coal Ass'n. v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987). In *Keystone*, various coal companies challenged Section 6 of the Pennsylvania Subsidence Act, which permitted the Commonwealth to revoke a mining permit if the operator of a mine failed to repair

surface damage resulting from subsidence, or satisfy a claim arising therefrom, within six months of same. 480 U.S. at 477. The coal companies asserted that the Act violated the Contracts Clause of Article I, Section 10 of the Constitution, inasmuch as the Act would not allow the companies to hold surface owners of property to their previously-executed contractual waivers of liability for damage that may result to the surface property. 480 U.S. at 502.

The Court in *Keystone* began its analysis by noting that unlike other provisions in Article I, Section 10 of the Constitution, "the prohibition against impairing the obligation of contracts is not to be read literally." 480 U.S. at 502 (citations omitted). The Contracts Clause:

> "was made part of the Constitution to remedy a particular social evil--the state legislative practice of enacting laws to relieve individuals of their obligations under certain contracts--and thus was intended to prohibit States from adopting 'as [their] policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them.'"

Id., quoting *Home Building & Loan Assn. v. Blaisdell*, 290 U.S. 398, 439, 54 S.Ct. 231, 78 L.Ed. 413 (1934).

The Court in *Keystone* explained that the Contracts Clause now has limited application to the powers of the states:

> "[I]t is to be accepted as a commonplace that the Contract Clause does not operate to obliterate the police power of the States. 'It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into

> between individuals may thereby be affected. This power, which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals.' As Mr. Justice Holmes succinctly put the matter in his opinion for the Court in *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357, 28 S.Ct. 529, 531, 52 L.Ed. 828 (1908): 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter.'"

480 U.S. at 503-04 (other citations omitted).

Applying the above principles to the Pennsylvania Subsidence Act, the Court in *Keystone* held that the Act completely removed the surface owners' contractual obligations to waive damages resulting from subsidence. 480 U.S. at 504. As such, the Subsidence Act operated as a "substantial impairment of a contractual relationship." *Id.* [4]

Unlike in *Keystone*, Brown has never stated precisely what "obligations" under the alleged trust "contract" would be impaired as a result of taxation pursuant to the GCAL. Even assuming, *arguendo*, that a contractual obligation existed in this case, it is clear that the GCAL does not impair the power of the parties to that "contract" to enforce its terms. Regardless, it is clear from the record of this case that the Commonwealth of Pennsylvania did not pass the GCAL

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[4] The Court in *Keystone* subsequently held that the Pennsylvania Subsidence Act survived Constitutional scrutiny, inasmuch as the Commonwealth had a "strong public interest" in preventing the type of environmental harm that prompted the enactment of the statute. 480 U.S. at 504-06.

in order to "impair" any of the rights or obligations of the Kepoint Preservation Trust under any contract. To the contrary, it was Brown who attempted to circumvent the ability of the Respondents to tax the real property that is the subject of this case.

In sum, with regard to the question of whether the Pennsylvania General County Assessment Law impairs the obligation of contract in violation of Article I, Section 10 of the Constitution, the Petitioner has failed to demonstrate that the Supreme Court of Pennsylvania decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals; that it decided an important question of federal law that has not been, but should be, settled by this Court; or that it decided an important federal question in a way that conflicts with relevant decisions of this Court. To the contrary, the decisions entered by the Pennsylvania courts are entirely consistent with the decisions of this Court. Accordingly, the Respondent, Perkiomen Valley School District, respectfully submits that Brown's Petition for a Writ of Certiorari should be denied.

IV. Brown's Petition For A Writ Of Certiorari Should Be Denied Because This Honorable Court Has Already Determined That Where A State Taxing Statute Provides A Clear And Certain Remedy, A Taxpayer Cannot Avoid Those Statutorily-Prescribed Administrative Procedures By Bringing An Action Pursuant To 42 U.S.C. §1983.

As discussed above, the Respondents appropriately taxed the Subject Property pursuant to the Pennsylvania General County Assessment Law. It is therefore respectfully submitted that there is no basis

for a claim pursuant to 42 U.S.C. §1983. However, even assuming that Brown believed that the Subject Property was exempt from taxation, the plain terms of the GCAL required him to first "apply for redress" and exhaust specific statutory procedures before challenging the assessment of real estate taxes in the courts of Pennsylvania. Specifically, Section 511 of the General County Assessment Law provides for such claims to be heard before a three-member board of assessment appeals. *See* 72 P.S. §5020-511. Under Pennsylvania law, this statutory remedy is the mandatory and *exclusive* remedy of persons claiming that their real estate is exempt from local taxes. *See Aquarian Church of Universal Service v. County of York*, 90 Pa.Commw. 290, 494 A.2d 891 (1985); *Appeal of Susquehanna Collieries Co.*, 335 Pa. 337, 6 A.2d 831 (1939) (A taxpayer aggrieved by an assessment must follow the procedure set forth in the GCAL; he cannot appeal an assessment directly to the court of common pleas without first submitting it to the Board of Revision.) Brown does not dispute that he never pursued such a remedy.

A. The Pennsylvania courts correctly relied upon this Court's decision in *National Private Truck Council, Inc. v. Oklahoma Tax Commission.*

Brown asserts that his action was inappropriately dismissed because administrative remedies supplied by the states are not a necessary prerequisite to bringing a claim pursuant to 42 U.S.C. §1983. However, this Court came to the opposite conclusion with respect to matters of state taxation in *National Private Truck Council, Inc. v. Oklahoma Tax Commission*, 515 U.S. 582, 115 S.Ct. 2351, 132 L.Ed.2d 509 (1995). In *National Private Truck Council*, the

plaintiffs brought a Section 1983 claim challenging the constitutionality of "third-structure taxes" imposed by the state of Oklahoma.[5] On appeal, the Oklahoma Supreme Court held that the plaintiffs were not entitled to relief under Section 1983 because adequate remedies for challenging the tax existed under state law. The United States Supreme Court granted certiorari "to resolve a conflict among the state courts as to whether, in tax cases, state courts must provide relief under [Section] 1983 when adequate remedies exist under state law." 515 U.S. at 585.

The Court in *National Private Truck Council* initially observed, as it stated more than a century earlier in *Dows v. Chicago*, 78 U.S. 108, 11 Wall. 109, 20 L.Ed. 65 (1871), that the principles of federalism and comity generally hold that federal courts "should adopt a hands-off approach with respect to state tax administration." 515 U.S. at 586. The Court further expounded upon the reasons for the continuation of this practice:

> "It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible."

515 U.S. at 586, quoting *Dows*, 11 Wall. at 110.

The Court in *National Private Truck Council* further observed that Section 1983 has not been interpreted to interfere with the power of the states to tax: "[s]ince the passage of § 1983, Congress and this Court repeatedly have shown an aversion to federal

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[5] As explained by the Court, "third-structure taxes" are "nonregistration, nonfuel taxes that are neither apportioned nor prorated. One example of a third-structure tax is an axle tax, which imposes a flat charge based on the number of axles per vehicle." 515 U.S. at 584 n. 1.

interference with tax administration." *Id.* Thus, the Court noted that "[a]s long as state law provides 'a clear and certain remedy,' the states may determine whether to provide predeprivation process (e.g., an injunction) or instead to afford postdeprivation relief (e.g., a refund)." 515 U.S. at 587 (citations omitted). The Court in *National Private Truck Council* therefore opined that because the plaintiffs did not dispute the adequacy of Oklahoma's legal remedies for the redress of tax disputes, Section 1983 "did not authorize the disruption of state tax administration." 515 U.S. at 590. Accordingly, the Court held that the plaintiffs were required to exhaust the state administrative remedies instead of filing a civil action under Section 1983. 515 U.S. at 592.

Brown attempts to argue that *National Private Truck Council* is inapplicable because the administrative remedies established under the GCAL for the redress of tax grievances are inadequate. In his Petition for a Writ of Certiorari, Brown asserts that his action "raises no question of an overassessment or an improper exemption in connection with the tax," but rather, raises a question concerning the validity or constitutionality of the GCAL, which question the Montgomery County Board of Assessment Appeals is allegedly incompetent to address. (*See* Brown's Petition for a Writ of Certiorari, at 20-21.) However, even in his Petition for a Writ of Certiorari, filed more than two years after he instituted suit, Brown cites no authority stating that entities such as the Board of Assessment Appeals are generally incapable of measuring the validity or applicability of the very statutes under which they operate. Furthermore, Brown fails to state precisely what issues relevant to this case the Board of Assessment Appeals would be incapable of determining, and he has never provided any evidence as to how or why the Board of Assessment Appeals would be incompetent to address those issues. Finally, and

perhaps most importantly, Brown does not state how or why the Board of Assessment Appeals would be incapable of granting him the relief he requests in this case, which presumably is to allow the Subject Property to go untaxed. Accordingly, Brown fails to demonstrate that the trial court incorrectly relied upon *National Private Truck Council* in denying his Petition for Preliminary Injunctive Relief and dismissing his Complaint. (*See* Appendix to Brown's Petition for a Writ of Certiorari, at 10a and 17a.)

B. Other Supreme Court and state cases cited by Brown with regard to the exhaustion of administrative remedies in Section 1983 actions are inapplicable to the present case, in which the challenged action relates to state taxation.

Brown attempts to argue that the decisions of the Pennsylvania courts were in conflict with decisions of this Court and/or the decisions of other state courts of last resort concerning an important federal question. Although Brown cites a long list of cases that he claims support his position that administrative remedies need not be exhausted before bringing a claim pursuant to Section 1983, a review of those cases reveals that they are all inapplicable to the present matter.

First, Brown argues against the application of *National Private Truck Council* by claiming that it conflicts with previous decisions of this Court. Notably, however, none of the Section 1983 cases cited by Brown pertain to matters of state taxation, which is the issue presented in this case. *See Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990) (plaintiff challenged Florida's statutes governing admission of mental patients into state hospital); *Monell v.*

Department of Social Services of the City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (Section 1983 claim relating to police department's discriminatory policy relating to pregnant employees); *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 473 (1961) (Section 1983 claim relating to illegal search and seizure by city police officers); *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982) (plaintiff challenged employer's allegedly discriminatory employment practices); *Felder v. Casey*, 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988) (same).

As this Court explained in *National Private Truck Council*, claims involving matters of state taxation are a different creature than other types of Section 1983 claims, such as the ones presented in the cases cited by Brown. This is because federal courts adopt a "hands-off approach" with respect to state tax administration for purposes of Section 1983. *National Private Truck Council*, 515 U.S. at 586. Inasmuch as the present case involves matters of state tax administration, the Pennsylvania courts appropriately applied *National Private Truck Council*.

Similarly, although Brown cites eleven cases from different state courts in support of his argument that exhaustion of state remedies is not required in civil rights actions, the overwhelming majority of those cases also relate to matters other than state taxation. *See Diedrich v. City of Ketchikan*, 805 P.2d 362 (Alaska 1991) (plaintiff asserted Section 1983 claim based on allegedly unlawful employment action); *Eberhardt v. Levasseur*, 630 So.2d 844 (La. 1994) (same); *Prager v. State of Kansas, Department of Revenue*, 271 Kan. 1, 20 P.3d 39 (2001) (same); *Maryland-National Capital Park and Planning Comm'n. v. Crawford*, 307 Md. 1, 511 A.2d 1079 (1986) (same); *Leach v. New Mexico Junior College*, 132 N.M. 106, 45 P.3d 46 (2002) (same);

Montoya v. City of Colorado Springs, 770 P.2d 1358 (Colo.App. 1989) (same); *King ex rel. Jacob v. Secretary, Indiana Family and Social Services Org.*, 774 N.E.2d 1008 (Ind.Ct.App. 2002) (plaintiff brought claims under Section 1983 and Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, as a result of defendants' failure to increase the amount of her home health care); *Petersen v. Davenport Community School District*, 626 N.W.2d 99 (Iowa 2001) (plaintiff class contended that school district violated their due process rights by invalidating signatures on petitions seeking election to block instructional support program approved by board); *New York City Coalition to End Lead Poisoning v. Giuliani*, 187 Misc.2d 425, 720 N.Y.S.2d 298 (2000) (plaintiffs alleged violation of Section 1983 and Medicaid Act, 42 U.S.C. §1396, as a result of defendants' alleged failure to provide adequate lead-poisoning screening, diagnosis and treatment program); *Mosher v. City of Lakewood*, 807 P.2d 1235 (Colo.App. 1991) (plaintiff brought Section 1983 claim based on alleged assault and battery by city police officers). Notably, the Court in *Prager* observed that the outcome of that case might have been different if the state taxation exception to the "no-exhaustion rule for § 1983 actions" were applicable. 20 P.3d at 52.

Brown cites only one state case involving a Section 1983 claim that arguably falls under the category of state taxation. *See Peoples Rights Organization v. Montgomery*, 142 Ohio App.3d 443, 756 N.E.2d 127 (2001). Notably, however, *Montgomery* was decided by an intermediate-level court from Ohio. Therefore, that decision alone does not warrant the exercise of this Court's jurisdiction, which is reserved only for conflicts among decisions by the state courts "of last resort." *See* U.S. Sup. Ct. R. 10(a).

Regardless, *Montgomery* is distinguishable from the present action and is not in conflict with any of the

decisions entered by the Pennsylvania courts in this case. The court in *Montgomery*, following the Ohio Supreme Court's earlier decision in *Conley v. Shearer*, 64 Ohio St. 3d 284, 595 N.E.2d 862 (1992), held that an Ohio statute, which would otherwise require claims against the state to be submitted to a Court of Claims, "is not applicable to Section 1983 claims because such suits are founded in federal, not state, law." 756 N.E.2d at 155. However, a closer examination of the Ohio Court of Claims statute reveals that the statute expressly limits its application to "any civil action that arises under *the law of this state*." *Conley*, 595 N.E.2d at 869, citing R.C. 9.86 (emphasis in original). Hence, the courts in *Conley* and *Montgomery* determined that the administrative remedies provided under the Ohio Court of Claims statute were specifically limited to claims arising under Ohio law, and had no application to claims arising under Federal law. *Id.*

Unlike in *Conley* and *Montgomery*, the GCAL contains no specific provision limiting the application of its remedies to claims arising under state law. Accordingly, *Montgomery* cannot be read to hold, as Brown suggests, that there is a conflict among the states as to whether a civil rights plaintiff must first exhaust state administrative remedies, even in matters of state taxation or assessments.

For all of the foregoing reasons, it is clear that the Pennsylvania courts appropriately relied upon this Honorable Court's decision in *National Private Truck Council* in dismissing or affirming the dismissal of Brown's action. Accordingly, Brown has failed to establish that that the Supreme Court of Pennsylvania has "decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;" that it has "decided an important question of federal law that has not been, but should be, settled by this Court;" or

that it has "decided an important federal question in a way that conflicts with relevant decisions of this Court." U.S. Sup. Ct. R. 10.

CONCLUSION

For all of the foregoing reasons, Respondent, Perkiomen Valley School District, respectfully requests that the Petition for a Writ of Certiorari filed by Petitioner, S. James Brown, Joint Tenant Trustee, be denied.

Respectfully submitted,

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Date: May 26, 2005

APPENDIX

UNREPORTED – NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 01-3708

KEPOINT PRESERVATION TRUST ORG., BY AND THROUGH J. BROWN, JOINT TENANT TRUSTEE

v.

D. MICHAEL FISHER, INDIVIDUAL; COMMONWEALTH OF PA; COMMONWEALTH OF PA DEPARTMENT OF REVENUE BUREAU OF INDIVIDUAL TAXES; COMMONWEALTH OF PA BOARD OF FINANCE AND REVENUE; COMMONWEALTH OF PA DEPARTMENT OF REVENUE BOARD OF APPEALS; THE TAX CLAIM BUREAU COURT HOUSE; EDWARD W. GILLESPIE, TRAPPE BORO TAX COLLECTOR; COUNTY OF MONTGOMERY RECORDER OF DEEDS

Kepoint Preservation Trust Org.,
Appellant

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civ. No. 00-cv-04564)
District Judge: Mary A. McLaughlin

Submitted Under Third Circuit LAR 34.1(a)
June 26, 2002

Before: SLOVITER, AMBRO AND ROSENN,

CIRCUIT JUDGES
(Filed Jul. 03 2002)

OPINION

PER CURIAM

In September 2000 a civil rights complaint signed by "J. Brown, Joint Tenant Trustee for Plaintiff" was filed in the United States District Court for the Eastern District of Pennsylvania on behalf of "Kepoint Preservation Trust Org. . . . an independent, unincorporated, private inter vivos trust organization" and "Plaintiff, J. Brown, Joint Tenant trustee." The complaint, which arose from the imposition of state transfer taxes following the transfer of real estate from an individual to the trust,[1] alleges that taxation of the trust violates both the Contracts Clause, U.S. Const. Art. I, § 10, cl. 1, and Pennsylvania law. The complaint seeks actual punitive damages, along with injunctive and declaratory relief.

I

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[1] In May 1997 the Bureau of Individual Taxes of the Pennsylvania Department of Revenue made a determination of transfer tax due. In August 1997 Kepoint petitioned the Board of Appeals for redetermination. After the Board sustained the transfer tax deficiency, Kepoint filed an appeal with the Board of Finance and Revenue, which denied the appeal. Instead of appealing to the Commonwealth Court of Pennsylvania pursuant to 42 Pa. Cons. Stat. § 763, Kepoint filed an action in the Montgomery County Court of Common Pleas, which dismissed the action because the Commonwealth Court had exclusive jurisdiction.

The district court granted the defendants' motion to dismiss. The court concluded that the state and its agencies are protected from the action by the Eleventh Amendment because Pennsylvania has not waived its immunity, while the action against defendant Fisher in his individual capacity is barred by the Tax Injunction Act, 28 U.S.C. § 1341, which expressly bars federal courts from granting injunctive relief in cases involving tax schemes where a "plain, speedy, and efficient" remedy exists under state law. The court found that the system of review provided by 42 Pa. Cons. Stat. §§ 1104, 763 and 723 is such an avenue because it provides the taxpayer with a full hearing and judicial determination at which he could raise any and constitutional objections to the tax as required by *Rosewell v. LaSalle National Bank*, 450 U.S. 503 (1981). The court concluded that the claims fro declaratory and monetary relief were also barred by the Tax Injunction Act and declined to assert jurisdiction over the sate law claim. The plaintiffs filed a motion for reconsideration, which was denied along with their outstanding motions. This timely appeal followed.

II

As an initial matter, we note that J. Brown is not an attorney who is a member of this Court's bar and thus may not represent a party other than himself. *Rowland v. California Men's Colony*, 506 U.S. 194 (1993). Mr. Brown filed an amended notice of appeal stating that he was appealing the district court's judgment, but because it was unclear whether he also sought to represent Kepoint, the Clerk sent him a letter advising that, pursuant to *Rowland*, he may not represent Kepoint and that he should obtain counsel to represent Kepoint on pain of dismissal. Mr. Brown responded to the Clerk, but has not obtained counsel to

represent Kepoint. It is unclear from his response whether he is arguing that he should be allowed to represent the trust or is proceeding on his own behalf exclusively. To the extent that Kepoint is a party to the appeal, the appeal is dismissed as to it.

To the extent that Mr. Brown himself was a party to the action below and is an appellant here in his own right, we shall affirm the judgment of the district court for essentially the same reasons given by the district court in granting the defendants' motion. The Tax Injunction Act bars both injunctive and declaratory relief, *California v. Grace Brethren Church*, 457 U.S. 393, 408 (1982), while "the free-standing principle of comity" bars damages. *Wright v. Pappas*, 256 F.3d 635, 637 (7th Circ. 2001). Mr. Brown's motion to file a supplemental reply brief is denied as moot.